Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Deployment of Wireline Services Offering Advanced Telecommunications Capability, *et al.*	)	CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-91, and CCB/CPD No. 98-15, RM 9244

OPPOSITION OF COVAD COMMUNICATIONS COMPANY TO PETITIONS FOR RECONSIDERATION

In an attempt to stamp out a chance of widespread local competition in residential and business markets, two Regional Bell Operating Companies—Bell Atlantic Corporation and SBC Communications, Inc. ("Petitioners")—have asked this Commission to reconsider critical aspects of the recent *Advanced Services Memorandum Opinion and Order*.[1] Covad Communications Company ("Covad") objects to these efforts.

These companies seek to undermine the very basis of Section 706 and the *Advanced Services* proceeding by arguing that they need not provide "conditioned" DSL-capable loops to competitors like Covad, even though they have been conditioning loops to provide digital services for years. Petitioners' claim that loop conditioning constitutes a "superior" service is both demonstrably false and legally flawed. At most, conditioning loops to support digital services is nothing more than a reasonable "modification" of

[1] Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, and CCB/CPD No. 98-15 RM 9244, filed Sept. 8, 1998; Petition for Reconsideration of Bell Atlantic Corp., CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, and CCB/CPD No. 98-15 RM 9244, filed Sept. 8, 1998 ("BA Petition").

ILEC outside plant which the Eighth Circuit explicitly stated was within the Commission's authority to require.

SBC and Bell Atlantic, which will potentially (if all proposed mergers are consummated) control over *60%* of the nation's access lines, have slapped the faces of consumers, the information technology industry, and CLECs by arguing that they need not provide loops capable of supporting high bandwidth services. These arguments stand in stark contrast to the press releases of these firms that promise advanced services to bandwidth-starved computer users. In these Petitions, SBC and Bell Atlantic continue their proud tradition of hostility to the information technology industry and competition—a tradition served every time an RBOC argues that Internet Service Providers must pay carrier access charges and every time an ILEC breaches the reciprocal compensation clauses of interconnection contracts simply because CLECs have been able to cater to the needs of Internet Service Providers better than ILECs.

Covad's comments in the *Advanced Services NPRM* discuss that ensuring that CLECs have the *parity of opportunity* to utilize fully the "features, functions and capabilities" of the existing outside plant is the key in implementing the goals of Section 706. Petitioners clearly reject that world and only seem interested in controlling and delaying the pace of DSL deployment by everyone—including CLECs—until Petitioners are "ready." The Internet community has been "ready" for high bandwidth last-mile solutions for years. The Commission should not condone this hostile attitude towards competitive DSL deployment.

I. ILECS CONDITION LOOPS FOR DIGITAL AND ANALOG SERVICES EVERY DAY

The Petitions utterly mischaracterize the manner in which the existing telephone network is built, used, and maintained. It is abundantly clear that *today*, ILECs, including Petitioners, "condition" their outside copper loop plant to maximize suitability of that plant for a variety of analog and digital services, such as POTS, ISDN, frame relay, and HDSL T1 services. Indeed, the type of conditioning work—such as removing an analog load coil or bridge tap and possibly a spectral interference check—that makes loops capable of supporting DSL services is precisely the same type of work the ILECs undertake to provide an ISDN line, a frame relay circuit or a T1 line that uses HDSL technology.[2] ILECs, in their ordinary course of business, perform these modifications every day on existing outside plant.[3]

For example, Pacific Bell/SBC's current interconnection agreement with Covad (and presumably other CLECs) defines *one* loop element for both ISDN and DSL uses—a "Digital ISDN/xDSL Capable Link."[4] Pacific Bell's ADSL tariff in California states

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[2] ILECs have been deploying xDSL technology for years—just not to residential consumers. In particular, ILECs utilize HDSL to support T1 service to businesses. More than two years ago, Datarequest report stated that "[h]igh-speed digital subscriber line (HDSL) has continued to gain acceptance within telcos. . . . Some vendors are now targeting the residential market and proposing HDSL solutions for consumers." Eileen Healy, Dataquest Perspective PNEQ-NA 9601 - Apr 1996 (April 15, 1996) at 1.

[3] Indeed, as of October 6, 1997, Bell Atlantic had deployed 17,432 T1 lines in New York using HDSL technology. Letter from Maureen Thompson, Counsel, Bell Atlantic, to Dhruv Khanna, General Counsel, Covad, Case 97-C-1419 (Oct. 6, 1997). Covad learned that salient fact after filing a motion to compel after Bell Atlantic originally told a New York State Commission ALJ that it "does not currently provision to itself or offer ADSL- or HDSL-compatible links . . ." Letter from Maureen Thompson, Counsel, Bell Atlantic, to Hon. Jaclyn A. Brilling, Administrative Law Judge, New York Department of Public Service, Case 97-C-1419 at 5 (Sept. 16, 1997).

[4] Interconnection Agreement between Covad Communications Company and Pacific Bell, Section 2.1 (April 21, 1997). The fact that ISDN and DSL loops are often interchangeable has allowed Covad to uncover evidence of SBC discrimination in unbundled loop provisioning. Covad's Comments in SBC's 706 Petition earlier this year described how a Covad employee's order for a Covad DSL line was delayed because Pacific Bell/SBC claimed that a suitable loop was "unavailable". That employee subsequently ordered and obtained ISDN service from Pacific. After the employee's ISDN service was installed, Covad

that it will condition loops for its ADSL service (albeit for $900).[5] Some states, such as Texas, are actively looking at DSL conditioning issues. Other states, such as Illinois and Michigan, already have successfully dealt with these issues and have approved monthly loop rates for DSL loops, ISDN loops, and analog POTS loops that are nearly identical—indicating that under the scrutiny of sophisticated cost studies, there is no significant difference in the construction, modification, conditioning, maintenance, and repair costs of these outside plant network elements.

When an ILEC constructs its outside plant, it does not construct an "analog outside plant," it makes its network construction decision based upon a projected "mix" of POTS and high bandwidth services (HDSL T1, frame relay, ISDN). That construction decision is *also* based upon the projected labor costs of maintaining and converting that outside plant between analog and high bandwidth digital services. In this very real sense, the "existing" outside local loop plant facility includes a calculation of labor costs to modify, condition, maintain, and repair that plant for a particular use in a particular instance—the facility itself and management of that facility are not artificially separated.[6]

As a result, Bell Atlantic's argument that conditioning requirements would "turn[] every incumbent local exchange carrier into a construction company for its competitors . .

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was able to successfully "cut over" its employee to Covad's DSL service. Comments of Covad Communications Company, CC Docket No. 98-91, filed June 24, 1998, at 7.

[5] Pacific Bell Telephone Company, Tariff FCC No. 128, Transmittal 1986 (June 15, 1998), at Section 17.7.4(B).

[6] The Eighth Circuit explicitly recognized that one cannot always separate "physical components" of a network and the software and human support involved in providing service. As a result, the court affirmed the Commission's decisions to unbundle directory assistance, operator services and OSS. *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir.), *cert. granted*, 118 S. Ct. 879 (1988). The Eighth Circuit explicitly stated that "the offering of telecommunications services encompasses more than just the physical components directly involved in the transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone service." *Id.* at 808.

. ." is based on a false dichotomy.[7] ILECs *already* are a substantial construction and maintenance company with regard to outside plant, and Section 251(c)(3) requires that the ILEC sell elements of that plant to CLECs. Outside plant maintenance, conditioning and construction costs are already factored into unbundled loop cost studies.

Indeed, the loop conditioning process is part of the routine work and "modifications" that ILECs perform on outside plant every day.[8] As described in Exhibit 2 to Covad's Comments in response to Pacific's 706 Petition in this docket,[9] the process of conditioning a loop to support DSL services is often nothing more than "de-conditioning" existing outside plant. The fact is that generally the most "low tech" of copper loops—an unencumbered twisted copper pair—best supports DSL services. The presence of analog load coils and repeaters on copper loops that "enhance" the analog POTS frequencies on those loops affirmatively halt transmission of other frequencies usable for higher bandwidth digital services.[10]

In addition, as described in Exhibit 2 to Covad's Comments in Pacific's 706 Comments, a bridge tap is a deployment option placed on a copper loop at the time of construction. That is, one twisted loop may have several "branches" (taps) to several neighborhoods, built by the ILEC because it cannot precisely know at the time of

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7 BA Petition at 4.

8 As discussed below, the Eight Circuit explicitly stated that its decision on the "superior-quality" rules was not intended to prohibit the Commission from requiring "modifications to incumbent LEC facilities that are necessary to accommodate interconnection or access to network elements." *Iowa Util. Bd.*, 120 F.3d at 813 n.33.

9 Covad Communications Company, *Defining Digital Loops*, Exhibit 2, Comments of Covad Communications Company, CC Docket No. 98-91, filed June 24, 1998. This paper may be found at http://www.covad.com/about/policy.html

10 Bell Atlantic admits that these encumbrances "were installed to enable the exchange carrier to provide high-quality voice service to its customers . . ." BA Petition at 2.

construction how demand for loops between these neighborhoods will arise. When an ILEC builds a loop with a bridge tap, it had previously decided that it is more efficient to build multiple taps and later remove any excessive number of these taps in the future than face the risk of either over- or under-building "home run" (un-tapped) loops to several adjacent neighborhoods. If an ILEC denies a CLEC the full efficiency of this network construction decision—by not removing bridge taps for UNEs when necessary—the ILEC is denying that CLEC parity of access to those elements.

Only a telecom monopolist could argue that de-conditioning loops by *removing* analog encumbrances or bridge taps requires it to build a "superior network." The network is already built, it "exists"[11]—it is simply trapped inside the circuit-switched world of the ILECs. The ILECs have limited the communications potential of the network by their own actions, and enshrining those limitations is wholly contrary to Section 706's objective of bringing broadband capabilities to all Americans.

II. PETITIONERS' LEGAL ARGUMENTS ARE INCORRECT AND INCONSISTENT WITH THEIR OTHER CONTENTIONS

There are three fatal legal problems with Petitioners' legal arguments regarding the Commission's loop conditioning requirements

A. Requiring Loop Conditioning is a Reasonable "Modification" to Outside Plant Explicitly Recognized and Permitted by the *Iowa* Court

In striking the Commission's superior-quality rule, the Eighth Circuit explicitly stated that the Commission may write unbundling rules that require "modifications to

[11] As discussed below, the key component of the Eighth Circuit's decision to strike the superior-quality rule is that the court believed that the rule would require ILECs to provide access to an "unbuilt superior" network—not just access to the "*existing* network" of the ILEC. *Iowa Util. Bd.*, 120 F.3d at 813

incumbent LEC facilities" to accommodate the provision of a UNE.[12] As made clear above, conditioning loops for digital and analog services are normal and routine outside plant modifications that occur every day on ILEC networks.

Petitioners have strained the Eighth Circuit's superior-quality ruling beyond credibility. The Eighth Circuit's superior-quality holding was clearly concerned about requirements that would require ILECs to build a "superior" network on demand or make "substantial" alterations to their networks.[13] The court's decision to restrict the Commission's ability to order construction of an "unbuilt superior network" is not relevant to conditioning unbundled loops, which is often necessary to utilize the full "features, functions and capabilities" of existing loop facilities.[14]

As the experience of Covad and other CLEC's demonstrates, the "capabilities" of existing outside loop plant include a broad array of DSL services, and modifying outside plant to suit particular digital or analog services is part of the normal, every day operations of ILEC outside plant engineers and line workers. Requesting that an ILEC condition a particular loop is *not* asking the ILEC to build a "superior" network—it is only asking the ILEC to perform a routine modification that it performs every day on the "existing" network. Such a requirement was fully contemplated and permitted by the *Iowa* court.[15]

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[12] *Iowa Util. Bd.*, 120 F.3d at n.33.

[13] *Iowa Util. Bd.*, 120 F.3d at 813 ("section 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network—not to a *yet unbuilt superior one*") (emphasis added); *id.* at n.33 ("we strike down the Commission's rules requiring incumbent LECs to alter *substantially* their networks", but FCC rules that require "modifications to incumbent LEC facilities" remain in place) (emphasis added).

[14] Section 153(29) of the Communications Act defines a "network element" to "include [the] features, functions, and capabilities that are provided by means of such facility . . . ." 47 U.S.C. § 153(29).

[15] Indeed, the *Iowa* court did not even mention loop conditioning as being required by the FCC's "superior-quality" rule. *Iowa Util. Bd.*, 120 F.3d at 813 (stating only that section 251(c)(3) "implicitly

B. Petitioners Can No Longer Appeal the Conditioning Requirement

Petitioners' arguments are not timely, because the conditioning requirement dates back over two years, to the Commission's August 8, 1996 *First Local Competition Order*. The *Advanced Services M&O* only clarified those existing requirements—in large part because it was demonstrated that ILECs (including SBC and Bell Atlantic) had not fully complied with those rules. Petitioners had their opportunity to dispute the conditioning requirement more than two years ago and chose not to do so until now—only after CLECs began to request unbundled conditioned loops in earnest.

SBC and Bell Atlantic cannot ignore these rules for two years and then seek to have them reversed only after the Commission indicates its willingness to enforce these rules. The time to appeal the *First Local Competition Order* has long since passed.

C. Petitioners' Section 706 Legal Theories are Internally Inconsistent

Both Petitions argue that the Commission has the independent authority under Section 706 to forbear from the requirements of Sections 251 and 271. If that legal theory is true, the Commission must also have the independent authority under Section 706 to order other "measures to promote competition" to advance those same goals.[16] That is, the Commission would have the independent authority under Section 706 to order ILECs to condition unbundled loops to support all forms of xDSL services—without regard to any "implicit" prohibition on "superior-quality" elements inherent in Section 251(c)(3). Petitioners cannot have it both ways.

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requires unbundled access only to an incumbent LEC's *existing* network—not to a yet unbuilt superior one."). The Eighth Circuit was concerned that the FCC's rule would permit CLECs to request that new networks be built at the whim of the CLEC—for example, construction of fiber rings or installation of an expensive digital switch where no digital switch exists.

[16] 47 U.S.C. § 157nt.

III. CONCLUSION

The Web pages of SBC, Bell Atlantic and other ILECs are littered with "announcements" of DSL services by these incumbent LECs, conveying the message to their local customers that ubiquitous ADSL is "on the way." However, the fact that SBC and Bell Atlantic are spending effort in this proceeding demonstrates that these carriers *are not* committed to widespread DSL deployment

The legal theory advanced by SBC and Bell Atlantic here would permit them to prevent CLEC deployment of competitive DSL services to neighborhoods and homes where SBC and Bell Atlantic are not deploying DSL services. If SBC and Bell Atlantic were actually interested in deploying DSL *throughout* their service territories, there is no reason for them to seek this DSL deployment veto—because Petitioners would be conditioning loops for DSL service throughout their service territories.

Through the legal posturing of these Petitions, SBC and Bell Atlantic reveal a strategy inimical to the goals of Section 706. These future custodians of 60% of the nation's local telephone network do not want to deploy DSL service ubiquitously, they want to limit CLEC deployment of DSL to certain geographic regions, and they only will provide targeted DSL service in a way that does not threaten existing subsidies and expensive T1 and similar services.

American consumers deserve competitive advanced services immediately, and CLECs are poised to provide these services. Granting these Petitions would condemn the deployment of these crucial next-generation services to the whim of ILECs—precisely the opposite of what Congress intended Sections 251 and 706 to accomplish.

Respectfully submitted.

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October 5, 1998

CERTIFICATE OF SERVICE

I, Brian J. McHugh, hereby certify that on this 5th day of October 1998 copies of the foregoing *Opposition of Covad Communications Company to Petitions for Reconsideration* were served by first class mail, postage prepaid, on the individuals on the attached service list.

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